No. 06-672

IN THE

Supreme Court of the United States

KENNETH P. WILK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

		Page
I.	This Case Presents Issues of Exceptional Importance That Divide the Circuits	1
	A. The Conflicts Are Square and Fully Developed	1
	B. The Issues Are Important and Recurring	4
	C. The Government's Substantive Arguments Are Beside the Point	6
II.	This Case Is an Excellent Vehicle	7
	A. The Reasonableness of Two Months' Notice Is Not Relevant to the Questions Presented	7
	B. The District Court's Stated Reasons for Continuing the Trial Will Not Impede Review	9
	C. The Delay Caused by Wilk's Appeal Is Irrelevant	10

TABLE OF AUTHORITIES

Page

CASES

Boeing Co. v. *United States*, 537 U.S. 437 (2003) 2

Central Laborers' Pension Fund v. *Heinz*, 541 U.S. 739 (2004) 2

City of Rancho Palos Verdes v. *Abrams*, 544 U.S. 113 (2005) 2

General Dynamics Land Sys., Inc. v. *Cline*, 540 U.S. 581 (2004) 2

Koons Buick Pontiac GMC, Inc. v. *Nigh*, 543 U.S. 50 (2004) 2

NCAA v. *Smith*, 525 U.S. 459 (1999) 8

United States v. *Ayala-Lopez*, 457 F.3d 107 (1st Cir. 2006) 2, 3

United States v. *Breeden*, 366 F.3d 369 (4th Cir. 2004) 1, 3

United States v. *Ferebe*, 332 F.3d 722 (4th Cir. 2003) 1, 2, 3, 10
344 F.3d 437 (4th Cir. 2003) 3, 4

United States v. *Gonzalez-Lopez*, 126 S. Ct. 2557 (2006) 7

United States v. *Jackson*, 390 U.S. 570 (1968) 5

United States v. *Robinson*, 473 F.3d 487 (2d Cir. 2007) 1, 3

United States v. *Rosado-Rosario*, No. 97-049, 1998 WL 28273 (D.P.R. Jan. 15, 1998) 4, 5

Wiggins v. *Smith*, 539 U.S. 510 (2003) 9

STATUTE

18 U.S.C. § 3593(a) 1, 4, 5, 7

TABLE OF AUTHORITIES—Continued

Page

MISCELLANEOUS

Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 109th Cong., 2006 WLNR 5404524 (Mar. 31, 2006) 5

Gov't CVSG Br. in *Central Laborers' Pension Fund* v. *Heinz*, No. 02-891 (Oct. 2003) 3

Gov't Pet. for Rehearing En Banc in *United States* v. *Ferebe*, No. 01-22 (4th Cir. July 30, 2003) 4

Pet. in *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, No. 03-377 (Sept. 4, 2003) 3

U.S. Attorneys' Manual § 9-10.020 4

REPLY FOR PETITIONER

The government concedes that this case presents not one but *two* express circuit splits relating to the administration of the federal death penalty. See Gov't Opp. 11, 17. Its arguments for nonetheless opposing review are unpersuasive. The government itself has stressed the importance of the issues presented. Its purported concerns over whether this case is an "ideal vehicle" (*id.* at 20) are insubstantial. And the "procedural device" it has adopted in an effort to mitigate the circuit splits' impact (*id.* at 18-19) is so patently contrary to the terms of the Federal Death Penalty Act as to underscore the need for this Court's review.

I. THIS CASE PRESENTS ISSUES OF EXCEPTIONAL IMPORTANCE THAT DIVIDE THE CIRCUITS

A. The Conflicts Are Square and Fully Developed

The government acknowledges, as it must, that both questions presented in this case "implicate disagreements in the circuits." Gov't Opp. 11; see *id.* at 17 (conceding the "existence of circuit conflicts on both the jurisdictional and the merits issue"). With respect to jurisdiction, the Fourth Circuit has held that "orders denying motions to strike Death Notices as untimely filed are immediately appealable." *United States* v. *Ferebe*, 332 F.3d 722, 726 (4th Cir. 2003); accord *United States* v. *Breeden*, 366 F.3d 369, 372-373 (4th Cir. 2004). The Eleventh Circuit has "agree[d]" with that holding. Pet. App. 21a. The Second Circuit has "reach[ed] the opposite conclusion," Gov't Opp. 17, refusing "to align [itself] with other courts of appeals that have held that such denials are immediately appealable," *United States* v. *Robinson*, 473 F.3d 487, 490-492 (2d Cir. 2007).

The government likewise concedes that there is a circuit split on the merits issue—how to determine whether a death notice was filed a "reasonable time before the trial" as required by 18 U.S.C. § 3593(a). Gov't Opp. 19-20. The Fourth Circuit compares the date the notice was filed to the "scheduled trial date" in existence "at the instant the Death

Notice was filed." *Ferebe*, 332 F.3d at 737 & n.6. In the decision below, the Eleventh Circuit rejected that approach as "not . . . persuasive" and held that courts are *not* limited to "counting only the days between the Death Notice and a scheduled trial date at the time of the filing of the Death Notice." Pet. App. 25a-27a & n.28. As the government concedes, moreover, the First Circuit has also "express[ed] its skepticism about the Fourth Circuit's [merits] holding in *Ferebe*." Gov't Opp. 20 n.9 (citing *United States* v. *Ayala-Lopez*, 457 F.3d 107, 108 (1st Cir. 2006)).

Those two square circuit conflicts are more than sufficient reason to grant review. This Court often grants certiorari in cases raising even a *single* split of comparable dimensions. See, *e.g.*, *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113 (2005) (2-1 split); *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, 543 U.S. 50 (2004) (1-1 split); *Central Laborers' Pension Fund* v. *Heinz*, 541 U.S. 739 (2004) (1-1 split); *General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581 (2004) (2-1 split); *Boeing Co.* v. *United States*, 537 U.S. 437 (2003) (1-1 split). This case presents *two* such conflicts, and it arises in a context—the administration of the federal death penalty—where the need for uniformity is especially acute. See FACDL Amicus Br. 4-9.

The government's insistence that only a "handful" of circuits have addressed these issues (Opp. 11) is thus beside the point. When there is a clear conflict among the circuits, the pertinent question is not how many cases line up on each side. Rather, it is whether the conflict should be resolved immediately or allowed to "percolate" in the hope that further consideration by other courts will clarify the issues or obviate the need for review. Where the issues are already fully vetted and there is no reasonable possibility that the circuit split will resolve itself, delay serves no purpose; it merely puts off this Court's inevitable review and causes needless uncertainty and litigation in the meantime.

Here, further dialogue among the lower courts will not clarify the issues. Both issues have already been debated at great length—in Judge Luttig's and Judge Niemeyer's opinions in *Ferebe*, 332 F.3d at 726-737, 740-753; in the subsequent *en banc* proceedings, 344 F.3d 437, 438-439 (4th Cir. 2003); in Judge Wilkins' opinion in *Breeden*, 366 F.3d at 372-375; in the Eleventh Circuit's decision below, Pet. App. 20a-30a; in the Second Circuit's decision in *Robinson*, 473 F.3d at 490-492; in the First Circuit's opinion in *Ayala-Lopez*, 457 F.3d at 108-109; and in the "flurry" of conflicting district court decisions (at least seven published opinions so far), Pet. 18-20. Delaying review so other courts can pick sides would not sharpen the issues; there is nothing new left to write. And the circuit split clearly will not resolve itself—the Fourth Circuit has turned down repeated opportunities to reconsider *Ferebe*. Delaying review will produce nothing but unnecessary confusion and litigation.

The government has successfully urged review in comparable cases. In *Heinz*, only two circuits had weighed in on the question presented (with arguable *dicta* in a third). See Gov't CVSG Br. in No. 02-891, at 6-7 & n.2 (Oct. 2003). Rejecting the respondent's argument that the Court should "delay addressing the issue . . . until other courts have considered the matter," the government urged that the case presented a "square conflict" on a "question of law" that would not be clarified by further opinions; that the issue had "substantial recurring importance"; and that "the need to ensure uniformity in the administration of . . . national legislation" warranted immediate review. *Id.* at 15-16; see also Pet. in *Koons Buick*, No. 03-377, at 13 (Sept. 4, 2003) (successfully urging review of 1-1 split because issue was a "crisp and clear one which will not be aided by further percolation"). Review of the *two* circuit splits presented by this case is appropriate for precisely the same reasons here.

B. The Issues Are Important and Recurring

The issues presented have tremendous practical significance. The government itself has argued as much: When it sought rehearing *en banc* in *Ferebe*, it told the Fourth Circuit that the issues were of "exceptional importance." Gov't Pet. for Rehearing En Banc at 2, No. 01-22 (4th Cir. July 30, 2003). Judge Niemeyer agreed that the issues were "important" and already "changing pretrial proceedings in capital cases in a significant way"; he voted against rehearing only because he thought "immediate review by the Supreme Court would be a more efficient resolution of the debate." 344 F.3d at 438. The government has also urged Congress to enact legislation to overturn *Ferebe*, invoking the issues' importance to the administration of the death penalty. Pet. 22. The government's current assertion that the issues are somehow "narrow" thus rings hollow.

The government also claims that review is unwarranted because it has adapted to the merits split: It now files death notices in the Fourth Circuit even *before* the Attorney General has decided whether to seek the death penalty. Gov't Opp. 18-19. It describes that procedure as "not optimal," *id.* at 19, but that is an understatement. The Federal Death Penalty Act requires the government to provide notice that it "*will* seek the sentence of death," 18 U.S.C. § 3593(a)(1)—not that it "*might* seek the sentence of death" or that it "*will decide whether* to seek the sentence of death at a later date." Only the Attorney General can decide whether the government *will* seek the death penalty. U.S. Attorneys' Manual § 9-10.020. The government's strategy of filing false death notices thus flouts the express terms of the Act.

For that reason, at least one court has effectively rejected the government's strategy already. In *United States* v. *Rosado-Rosario*, No. 97-049, 1998 WL 28273 (D.P.R. Jan. 15, 1998), the court struck a death notice that had been filed "'as a protective measure'" before the Attorney General's decision. *Id.* at *2-4. Absent Attorney General approval,

the court held, the notice "was, for all purposes, a hoax." *Id.* at *2. Thus, far from protecting the government's interests, the government's strategy only threatens *more* litigation over the validity of its death notices.

The strategy also undermines the statutory design. Defending a capital case requires extraordinary expenditures of time, money, and effort; capital defense counsel must ration their limited resources. See FACDL Amicus Br. 10-13. It is thus crucial for counsel to know whether the government actually intends to seek the death penalty. Section 3593(a)'s requirement of a formal death notice accomplishes that objective—it encourages the sober consideration expected in matters of this magnitude. The government's strategy of filing sham death notices based on a mere expectancy that it *might* pursue the death penalty has the opposite effect: It diverts scarce resources from cases where they are needed, inflicts needless anxiety on defendants, and wastes the time of courts and counsel alike.[1]

The government has conceded the inadequacy of its strategy before. When the Chief of the Department of Justice's Capital Case Unit testified before Congress in March 2006, she acknowledged that the government had adapted to *Ferebe* by filing "protective" death notices. See *Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong., 2006 WLNR 5404524 (Mar. 31, 2006). *Despite that adaptation*, she "strongly support[ed]" legislation overruling *Ferebe*, citing the Department's "commit[ment] to the goal of the consistent, fair and even-handed application of the death penalty, regardless of geography." *Ibid.* The government fails to explain why that commitment to uniformity does not similarly demand review here.

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[1] The strategy also has the potential to coerce guilty pleas from defendants misled into believing they will face the death penalty. Cf. *United States* v. *Jackson*, 390 U.S. 570, 582-583 (1968).

In any event, this Court should not assess the importance of the questions presented based solely on whether they interfere with the government's ability to prosecute. If the Fourth and Eleventh Circuits are correct that defendants have a right to appeal immediately from a refusal to strike a death notice, defendants in the Second Circuit will be wrongfully forced to suffer the anxiety and expense of a capital trial in order to vindicate their rights.[2] And if the Fourth Circuit is correct that timeliness depends on the scheduled trial date, defendants in the Eleventh Circuit will be wrongfully sentenced to a penalty the government has no statutory right to impose. Those interests too highlight the importance of the issues in this case.

C. The Government's Substantive Arguments Are Beside the Point

Half the government's argument is devoted not to the propriety of certiorari but to its substantive positions on the questions presented. Gov't Opp. 11-17. The government thus spends nearly five pages arguing that the denial of a motion to strike a death notice is not immediately appealable. *Id.* at 11-16. That is a strange basis for urging the Court to *deny* review of a decision holding that such notices *are* immediately appealable. The government made those same arguments to the Fourth Circuit in *Ferebe* and *Breeden*, to the Eleventh Circuit below, and to the First Circuit in *Ayala-Lopez*; three of those cases rejected its position

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[2] The government claims that the Eleventh Circuit's jurisdictional ruling should not "have significant adverse consequences for federal capital cases," citing that court's observations that there would be "'little need for future interlocutory appeals'" given its merits ruling, and that courts may decline review of "'clearly frivolous'" appeals. Gov't Opp. 18 (quoting Pet. App. 21a n.18). But the Eleventh Circuit was referring only to future appeals *in that circuit*. Its reasoning has no bearing in circuits that follow *Ferebe* or that have not yet addressed the issue—*i.e.*, virtually every other circuit. Capital defendants in those circuits will continue to file interlocutory appeals, and given the circuit split, few will be "clearly frivolous."

and the fourth assumed jurisdiction *arguendo*. If all those courts are exercising jurisdiction Congress denied them, that is a reason to *grant* the petition—not to deny it.

On the merits issue of how to measure the timeliness of a death notice, the government contends that, because the *purpose* of the notice is to ensure adequate time to prepare for trial, a notice should not be struck if prejudice can be avoided by continuing the trial. Gov't Opp. 16-17. But that argument "'abstracts from the right to its purposes, and then eliminates the right.'" *United States* v. *Gonzalez-Lopez*, 126 S. Ct. 2557, 2562 (2006). The *right* secured by § 3593(a) is the right to receive notice by a statutorily prescribed date—not the right to adequate time to prepare. We have not, as the government contends, "*assume[d]* that whether the defendant has received reasonable notice must be ascertained at the time the government files the notice." Gov't Opp. 17 (emphasis added). We have simply *concluded* that from the fact that Congress does not normally direct a party to perform an act at a time that cannot be ascertained until *after* the act is supposed to have been performed. See Pet. 27-29. The statute requires the government to provide notice a reasonable time before trial; it does not require courts to schedule trial a reasonable time *after* the notice. In any event, at most the government has shown that the issue is debatable. That, again, is a reason to *grant* review, not a reason to leave parties and courts mired in confusion.

II. THIS CASE IS AN EXCELLENT VEHICLE

A. The Reasonableness of Two Months' Notice Is Not Relevant to the Questions Presented

The government also urges that this case is not an "ideal vehicle" because even the two months between the filing of the death notice and the *scheduled* trial date then in place was sufficient. Gov't Opp. 20-22. But the government nowhere explains how that dubious contention would impede this Court's review. The Eleventh Circuit did not reach the factbound issue of whether two months' notice was suffi-

cient, because it held that the *rescheduled* trial date was the one that mattered. Pet. App. 28a n.29; Gov't Opp. 20 n.10.[3] The correctness of *that* holding—or *Ferebe*'s contrary holding—is the issue before this Court. If the Court affirms, the adequacy of two months' notice would be irrelevant; if it reverses, the adequacy of two months' notice would at most be an issue for the Eleventh Circuit on remand. This Court normally does not review issues not reached by the court of appeals. See *NCAA* v. *Smith*, 525 U.S. 459, 469-470 (1999).

In any event, two months' notice was plainly inadequate. Death notices are filed an *average* of 11 months before trial. Pet. 8. *Three* courts have found notices inadequate in comparable circumstances; the government attempts to distinguish one case but does not even bother with the other two. Compare Pet. 16 with Gov't Opp. 22 n.11. And it cites *no* other case that has found two months' notice sufficient.

The government attempts to downplay the charges in this case as "rather basic." Gov't Opp. 21. Even if that were true—and it is not[4]—Wilk's *defense* to those charges was anything but basic. Wilk—who is hearing impaired and suffers from AIDS dementia—contends he mistook the officers for intruders. Pet. 3. That defense will require extensive expert medical testimony, mental-health testimony, and crime-scene reconstruction to explain how that mistake occurred. Moreover, merely to avoid being *constitutionally*

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[3] The government quibbles with our description of the Eleventh Circuit's opinion on this point, Gov't Opp. 20 n.10, but the petition accurately stated that the Eleventh Circuit "did not dispute" Wilk's contention that the notice was likely untimely under *Ferebe*. Pet. 17; see Pet. App. 28a n.29 ("assuming *arguendo* that the Death Notice might have been otherwise problematic without the continuance").

[4] The district court opined that the *homicide* charges were "rather basic," but it admitted that other charges involved a "degree of intricacy." Pet. App. 44a. Those other charges were critical because the government sought to rely on any conviction for them as an aggravating factor in support of the death penalty. *Id.* at 12a.

ineffective (to say nothing of being good), Wilk's counsel must thoroughly investigate Wilk's upbringing and other circumstances to root out potential mitigating evidence. See *Wiggins* v. *Smith*, 539 U.S. 510, 524 (2003). In light of such burdens, it is not surprising that defense counsel take *16 times* as long to prepare in capital cases. See FACDL Amicus Br. 12. Two months was not remotely enough.

B. The District Court's Stated Reasons for Continuing the Trial Will Not Impede Review

The government also argues that this case is not "ideal" because the district court continued the trial for reasons unrelated to the death notice. Gov't Opp. 22-23. But that too is irrelevant. Under the Eleventh Circuit's rule, the timeliness of a death notice depends on the *rescheduled* trial date, regardless of why trial was rescheduled. Pet. App. 25a-29a. Under the Fourth Circuit's rule, timeliness depends on the *scheduled* trial date in place when the notice was filed, regardless of the reason for any subsequent continuance. Pet. 18 n.6. This case thus perfectly presents the key point of disagreement between those circuits: whether the statutory phrase "reasonable time before the trial" refers to the *scheduled* trial date when the notice is filed or the later-established date when trial ultimately begins.

This Court could construe the statute to mean that the *scheduled* trial date always governs (the Fourth Circuit's rule). The Court could construe it to mean that the *rescheduled* trial date always governs (the Eleventh Circuit's rule). Or the Court could construe it to mean that the rescheduled trial date governs *if* trial is continued for reasons unrelated to the death notice (the trial court's rule). Any of those interpretations would be equally binding, and any one of them would resolve the circuit conflict and restore uniformity under the Federal Death Penalty Act. There is thus no merit to the government's suggestion that this case has "potentially limited value." Gov't Opp. 23.

C. The Delay Caused by Wilk's Appeal Is Irrelevant

Finally, the government contends that Wilk is "not well positioned" to seek review because the delay entailed by his interlocutory appeal alleviated any prejudice. Gov't Opp. 23. But *Ferebe* expressly holds that an untimely death notice must be struck "regardless of whether [the defendant] will or will not be, or was or was not, prejudiced." 332 F.3d at 732 (emphasis omitted). The government's claim that Wilk is not "well positioned" to complain simply assumes that *Ferebe* is wrong and that the government's own "no harm, no foul" interpretation of the statute is correct. Wilk need only be well positioned to press *his own* interpretation of the statute—not the *government's*. In any event, the delay did not alleviate the prejudice: The trial court stayed all proceedings pending appeal, thus preventing Wilk from filing motions or seeking disbursements necessary to develop his defense. See Order Removing Case from Trial Calendar and Staying All Proceedings (Aug. 5, 2005) (Dist. Ct. Docket #544).

The possibility of a post-trial appeal (Gov't Opp. 23) is likewise irrelevant. Courts permit interlocutory appeals in these cases *precisely because* a final appeal is *inadequate* to protect the defendant's rights. See Pet. App. 21a; *Ferebe*, 332 F.3d at 728-730. And a "fuller record" would not "assist this Court in conducting any appropriate analysis of prejudice." Cf. Gov't Opp. 23. Under *Ferebe*, *no* analysis of prejudice is appropriate. 332 F.3d at 732. The question presented here is whether *Ferebe* is correct; not whether Wilk would prevail even if it were not. Delaying review until after trial will thus achieve nothing—except to make this case a *worse* vehicle by preventing the Court from settling the split over the important jurisdictional issue.

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For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 2007